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Supreme Court of the United States

OCTOBER TERM, 1944

No. 953

JOHN F. X. FINN, as Trustee of Childs Company,
Petitioner,

v.

BURTON C. MEIGHAN, JR., as Substituted Trustee under the Last Will and Testament of WILLIAM T. WOOD, Deceased,
Respondent.

BRIEF OF RESPONDENT

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Supreme Court of the United States

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BURTON C. MEIGHAN, JR., as Substituted Trustee under the Last Will and Testament of WILLIAM T. WOOD, Deceased,
Respondent.

BRIEF OF RESPONDENT

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit is officially reported in 146 Fed. (2d) 594 (R. 43-45). The opinion of the District Court is set out in the Record at pages 36-39 and has not as yet been officially reported.

Jurisdiction

Writ of Certiorari was granted on March 5th, 1945 (R. 47).

The order allowing certiorari contained a request that counsel discuss in their briefs and upon oral argument the question whether the construction of the contract is governed by federal or state law.

Statement of Case

The respondent makes no objection to the statement of the case set out in the petitioner's brief on the merits.

The issue before this Court can be briefly stated as follows:

> The petitioner seeks a reversal of the decision of the Circuit Court of Appeals for the Second Circuit, affirming the action of the United States District Court for the Southern District of New York, in construing the clause "if the tenant shall be adjudged bankrupt or insolvent by any court" to apply to the order of the bankruptcy court which approved the petition of Childs Company for reorganization under Chapter X of the Bankruptcy Act and appointing John F. X. Finn as Trustee.

Summary of Argument

The construction of the forfeiture clause in the lease, in the absence of federal legislation, is governed by state and not federal law. Since the provisions of the bankruptcy laws are silent as to the construction to be placed upon the word "insolvent" as used in the clause "if the tenant be adjudged bankrupt or insolvent by any court" the federal courts must apply local law as evidenced by decisions of the state.

Both state and federal law have construed the word "insolvent" as used in the forfeiture clause to mean inability to meet obligations as they mature in the ordinary course of business and not in the bankruptcy sense of excess of liabilities over assets. Since state and federal law are in accord, it is unnecessary for this court to determine whether state or federal law applies.

The decision of the courts below construed the word "insolvent" so as to give effect to the fair meaning of the language as used by the draftsman of the lease and no statute or principle of law requires a construction of the word in the limited bankruptcy sense of excess of liabilities over assets.

The case of *Simmons* v. *National Tool Company*, 110 Fed. (2nd) 850 (C.C.A. 6), is not in conflict with the decision of the court below. The basis for the decision in the *Simmons* case was estoppel. Accordingly, the word "insolvent" and the interpretation to be placed thereon was not involved and was not considered by that court.

POINT I

The construction of the forfeiture clause in the lease, in the absence of federal legislation, is governed by state and not federal law.

State law, in determining the substantive rights of parties to a contract, is controlling in connection with a bankruptcy matter insofar as it does not conflict with any bankruptcy provision passed by Congress in the exercise of its constitutional power (*United States* v. *Bethlehem Steel Corporation*, 315 U. S. 289). In the event of a conflict the provision of the Bankruptcy Act will accordingly prevail and is to be applied by the federal courts sitting as a court of bankruptcy (*Sola Electric Company* v. *Jefferson*, 317 U. S. 173).

In the instant case, since the provisions of the bankruptcy laws are silent as to the construction to be placed on the word "insolvent", local and not federal law applies (*Erie Railroad Company* v. *Tompkins*, 304 U. S. 64). As was said in *Meredith* v. *Winter Haven*, 320 U. S. 228

> "Erie v. Tompkins did not free the federal court from the duty of deciding questions of state law in diversity cases. Instead, it placed on them a greater responsibility for determining and applying state law in all cases *within their jurisdiction in which federal law does not govern.*" (Italics ours).

Again, in *D'Oench, Duhme & Company* v. *Federal Deposit Insurance Company*, 315 U. S. 447 (concurring opinion by Mr. Justice Frankfurter):

> "There is no federal statute to override either the Missouri law as to estoppel or the Illinois law which treats respondent as a holder in due course. Were this court, in the absence of federal legislation, to make its own choice of law, Illinois or Missouri law would furnish the governing principles."

Counsel for petitioner contends that because of Section 70-b of the Bankruptcy Act (11 U.S.C.A., Section 110) federal, and not state law, is to apply in connection with the construction to be placed upon the word "insolvent" as used in the forfeiture clause in the lease. Petitioner overlooks the fact that this section goes no further than to establish a rule of construction to be placed upon covenants against assignments as expressed by this Court in *Gazlay* v. *Williams, Trustee*, 210 U. S. 41, which rule of law is in agreement with state rules (*Francis* v. *Ferguson*, 246 N. Y. 516). Furthermore, section 70-b does not void forfeitures but, on the contrary, it expressly permits them. It has not changed the law as to construction of leases nor the proposition that local law will be followed unless it is in conflict with a constitutional provision passed by Congress (*Erie* v. *Tompkins, supra*; *United States* v. *Bethlehem Steel Corporation, supra*).

POINT II

Both state and federal law construe the word "insolvent" as used in the forfeiture clause to mean inability to meet obligations as they mature in the ordinary course of business.

The primary issue in this case is whether the clause "if the tenant shall be adjudged bankrupt or insolvent by any court" applies to the order of the bankruptcy court which approved the petition of Childs Company for reorganization.

On October 26, 1943, the debtor filed a petition praying for relief under the Chandler Act, in which petition the debtor stated that it was unable to pay its debts as they mature. The District Court entered an order approving the petition as filed. This is an adjudication that the debtor is unable to pay its debts as they mature. Section 141 of the Bankruptcy Act (11 U.S.C.A., Section 541); Section 131 of the Bankruptcy Act (11 U.S.C.A., Section 530); *In re Walker*, 93 Fed. (2nd) 281 (C.C.A. 2).

Federal courts have construed the word "insolvent" to mean inability to meet debts as they mature in the ordinary course of business in forfeiture clauses similar to the one in the instant case (*In Schulte Retail Stores*, 22 Fed. Supp. 612, aff'd *In re Walker*, 93 Fed. (2) 281; *In re Wil-low Cafeterias, Inc.*, 22 Fed. Supp. 615, rev'd on another ground 95 Fed. (2) 306, cert. den. 304 U. S. 567). Judge Knox in the *Schulte* case said:

> "Obviously, the draughtsman of the lease did not intend that his alternatives should be construed as synonymous. If the phrase 'proceedings in bankruptcy' be interpreted strictly and most favor-

ably to the debtor, we may assume that it pertained to the condition of liabilities exceeding assets. Hence, 'insolvent' must be taken to apply to situations not precisely within the purview of a bankruptcy proceeding, as of the date of the lease, viz. 1920, and inability to meet obligations as they matured was just such a situation. Hence, I believe that the debtor has admitted insolvency within the forfeiture clause.

"This conclusion is buttressed by the legal definitions of insolvency prevailing at the time the lease was drawn. The word has been most frequently interpreted in connection with section 15 of the Stock Corporation Law, Consol. Laws, c. 59. The term insolvency in that statute has always connoted inability to meet obligations as they mature. Brouwer *v.* Harbeck, 9 N. Y. 589; Abrams *v.* Manhattan Brewing Company, 142 App. Div. 392; 126 N. Y. S. 844; French *v.* Andrews, 81 Hun 272; 30 N. Y. S. 796, affirmed 145 N. Y. 441, 40 N. E. 214. General Corporation Law, Consol. Laws, c. 23 §71, provides for dissolution 'where the corporation has remained insolvent for at least one year.' This section, upon the rare occasions when it has been invoked contemplates a failure to pay debts as they mature. People *v.* Troy Chemical Co., 118 App. Div. 437, 104 N. Y. S. 22. See, also, Benike *v.* New York Lime & Cement Company, 80 N. Y. 599. Another definition of insolvency is to be found in Personal Property Law, Consol. Laws, c. 41, §156, subd. 3.

"The foregoing statutes are obviously not controlling in the instant case, since they are used in connection with special situations, but they serve to demonstrate the interpretations and meaning of the term 'insolvency' existing at the time the lease was drawn. Furthermore, in the absence of statute, the term has come to mean inability to meet obligations as they mature. See Sterrett *v.* Third

National Bank, 46 Hun 22, affirmed 122 N. Y. 659, 25 N. E. 913; Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404. Debtor and Creditor Law, Consol. Laws, c. 12, §271, upon which the debtor relies, was enacted in 1925, and has no bearing on the interpretation of a term in a lease made in 1920.

"I conclude that the debtor has admitted it is 'insolvent', as that term was used in the lease and in the light of its meaning under the law of New York."

Similarly, Judge Patterson in the *Wil-low Cafeterias* case:

"It is the meaning commonly attached to insolvency by the New York Courts, unless some other definition is demanded by statute. Brouwer *v.* Harbeck, 9 N. Y. 589; Denike *v.* New York & Rosendale Lime & Cement Co., 80 N. Y., 599; French *v.* Andrews, 81 Hun 272, 30 N. Y. S. 796, affirmed 145 N. Y. 441, 40 N. E. 214; Baker *v.* Emerson, 4 App. Div. 348, 38 N. Y. S. 576; Horrocks Desk Co. *v.* Fangel, 71 App. Div. 313, 75 N. Y. S. 967; Joseph *v.* Raff, 82 App. Div. 47, 81 N. Y. S. 546, affirmed 176 N. Y. 611, 68 N. E. 1118; Abrams *v.* Manhattan Consumers' Brewing Co., 142 App. Div. 392, 126 N. Y. S. 844. The leases in question, being leases made in New York and covering real estate in New York, the parties will be taken to have used the word 'insolvent' in the sense given it by the New York law and to have intended that the lessor might terminate the leases if the lessee should arrive at a condition in which it was unable to pay its debts in ordinary course as they matured. It is idle to discuss the policy behind the enactment of section 77b, the question being not what the word 'insolvent' meant to Congress in passing that act but what it meant to the lessor and the lessee when they wrote it into these leases. This conclu-

sion is in accord with the view of Judge Knox in re: Schulte Retail Stores Corporation, 22 F. Supp. 612, decided March 27, 1937."

Again, in the words of Judge Hand in the *Walker* case:

> "The insolvency mentioned in the lease cannot have been other than a failure to meet the lessee's obligations as they matured; that is the insolvency which throws the lessor's relations into confusion, delays payment of the rent, impounds his property for an indefinite time, and in general makes it important for him to be free to reenter."

The decisions of the State of New York are of the same tenor. In *American Castaye Corporation* v. *Niles-Bement-Pond Company*, 266 A. D. 557, the Appellate Division, First Department, of New York Supreme Court, had before it for construction the word "insolvency" in a cancellation clause in a licensing agreement reading as follows:

> "If the corporation becomes insolvent or bankrupt or goes into liquidation, the license hereby granted shall thereupon terminate, cease and become null and void."

It appeared from that case that the licensee corporation was unable to meet its debts as they matured in the ordinary course of business, and the question before the court was whether the word "insolvent" as used in the cancellation clause meant inability to meet obligations as they matured in the ordinary course of business. The Court stated:

> "Under our common law 'insolvency' means inability to meet obligations as they mature in the

> ordinary course of business. (Brower *v.* Harbeck, 9 N. Y. 589; Denike *v.* New York Lime & Cement Company, 80 N. Y. 599; Abrams *v.* Manhattan Consumers Brewery Company, 143 A. D. 392)".

While forfeiture clauses are to be strictly construed, nevertheless, they are valid and will be enforced. The construction to be placed upon such clauses must give effect to the fair meaning of the language used (Section 70b Bankruptcy Act, 11 U.S.C.A. Section 110; *Model Dairy, Inc. v. Foltis-Fisher, Inc.*, 67 Fed. (2) 704; *Gillette Bros.* v. *Aristocrat Restaurant*, 239 N. Y. 87). As Judge Learned Hand in the *Model Dairy* case phrased it:

> "It is true that courts do not look upon such conditions with a 'friendly eye', classing them as forfeitures. (Citing cases.) Nevertheless, they are valid and we must give effect to the fair meaning of the language used."

Or as was said by Judge Andrews in the *Gillette Bros.* case:

> "Working a forfeiture, the language is to be strictly construed. * * * The clause should be given a reasonable construction."

That the construction placed upon the word "insolvent" by the courts below is reasonable and gives effect to the meaning [redacted] INTENDED to be conveyed by the draftsman when writing the lease in 1927, is clearly indicated by the following statement in the opinion of Judge Swan:

> "The Appellant contends that 'insolvent' as used in paragraph 4 of the lease refers to insolvency in the bankruptcy sense, that is, to an excess of liabilities over assets, rather than a

> inability to meet obligations as they mature. But such a construction would deprive the words 'or insolvency by any court' of all utility; they would add nothing to the preceding words 'adjudged bankrupt' * * * since the time honored meaning of insolvency, in the absence of a specified other meaning, is inability to meet obligations as they mature in the ordinary course of a business, it is entirely reasonable to suppose that the parties used 'insolvency' in that sense, rather than in the limited sense already covered by 'adjudged bankrupt'."

From the foregoing it appears that both federal and state decisions are in accord when construing the word "insolvent" and a determination as to whether state or federal law applies in the instant case is not necessary (*D'Oench, Duhme & Company* v. *F.D.I.C.*, 315 U. S. 447 (concurring opinion of Mr. Justice Frankfurter); *Prudence Realization Corporation* v. *Ferris*, case 137—October Term, 1944, decided January 24, 1945 (concurring opinion of Mr. Chief Justice Stone). In the *Prudence* case, Mr. Chief Justice Stone stated:

> "[redacted] judgment should be affirmed, not because the plan called for determination [redacted] of petitioner's rights in bankruptcy by state, rather than federal law, but because in the circumstances of this case the applicable federal law is the same as that which the state court has applied".

Phrased by Mr. Justice Frankfurter in the *D'Oench* case:

> "The Chief Justice and I concur in the result on the ground that in the circumstances of this case respondent is entitled to recover whatever law is deemed controlling."

POINT III

No statute or principle of law requires a construction of the word "insolvent" in the bankruptcy sense of excess of liabilities over assets.

Petitioner stresses the definition of insolvency in the New York Debtor and Creditor Law dealing with conveyances in fraud of creditors, enacted in 1925—3 years after the date of this lease. In that statute it is provided that insolvency means an excess of liabilities over assets. It is respectfully submitted that this statute does not represent a general New York definition of insolvency, nor is it a codification of the New York Common Law definition of insolvency, but rather one limited solely to cases involving conveyances in fraud of creditors. Consequently, petitioner's argument on this point cannot be countenanced (*In re Wil-low Cafeterias, Inc.*, 22 Fed. Supp. 617, 620; *Willcox* v. *Goess*, 16 Fed. Supp. 350, 363).

Petitioner's reference to Section 955 of the Penal Law of the State of New York regarding transactions by brokers and dealers after insolvency is not applicable to the instant case, since the Penal Law definition of insolvency is to be restricted solely to the criminal matters therein specified, and is not to be applied to civil matters and every day business transactions. Particularly is this true in the instant case involving a construction of a term used in the lease.

The contention of petitioner that the word "insolvent" as used in the lease is to be construed as referring solely to an adjudication of insolvency under the New York insolvency law as set forth in the Debtor and Creditor

Law is unsound. Assuming, *arguendo*, that the draftsman of the lease intended such, the words "in any court" following the word "insolvent" would not have been used. Rather, the draftsman would have used the words "under the laws of the State of New York". The fact that the draftsman did not use the phrase "under the laws of the State of New York" is proof that petitioner's contention is without merit.

It should not be overlooked that the debtor, Childs Company, was doing a chain store restaurant business in 1922, the date of this lease, and accordingly, the draftsman was aware of the fact that Childs Company might be involved in court proceedings in a jurisdiction other than the State of New York or the Southern District of New York. It is for this reason, and for no other, that the draftsman used the all embracing phrase "in any court".

Petitioner argues that the decision of the court below tends to defeat the very purpose of reorganization proceedings. Petitioner's argument is not novel and was rejected by this Court when advanced by counsel for the debtor in the *Wil-low Cafeterias* case when petitioning this Court for a writ of certiorari (Cert. den. *In re Wil-low Cafeterias* case, 304 U. S. 567).

It is again urged that the rule of *ejusdem generis* applies. No case is cited and the legal definition of *ejusdem generis* does not support the petitioner. The enumeration of specific things is not followed by a general word or phrase.

POINT IV

The decision of the Circuit Court of Appeals for the Sixth Circuit in *Simmons* v. *National Tool Co.*, reported in 110 Fed. (2d) 850, is not in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant matter, reported in 146 Fed. (2d) 594.

In the *Simmons* case the issue was the right to maintain an equity suit for damages and profits by reason of an alleged patent infringement. No forfeiture of a lease or other contract was involved.

The license agreement, after declaring National Tool Company to be the sole owner of six grinding machines, built at its own expense, with the right to use said machines in its factory at Cleveland, Ohio, states, "but the National Tool Company shall not have the right to sell or dispose of said machines directly or indirectly to any person or persons whatever, and in the event of the bankruptcy, insolvency or dissolution of the National Tool Company no title to said machines shall be vested in any receiver or trustee for purposes of using them in gear grinding shaper cutters".

There was nothing in the license to prevent the National Tool Company, the licensee, from using the machines even while involved in bankruptcy, insolvency or dissolution proceedings, or after its emergence from any such proceedings. The license agreement did not provide for forfeiture—it prohibited the sale of the machines to another or the passage of title from the licensee to any trustee or receiver.

In the instant case the court below had before it a long-term lease containing a definite and unequivocal forfeiture clause for the purpose of determining the scope of the said forfeiture clause.

The record in the *Simmons* case further indicates that Simmons and her counsel did not petition the bankruptcy court, pending reorganization proceedings, to declare a forfeiture of the license agreement, nor did they file any objections or take any exceptions to the reorganization proceedings. It should also be noted that the decree of confirmation provided, "that the status of the executory contracts of the debtor described in these proceedings and the rights, privileges and liabilities of the parties herein with respect thereto, as now existing, shall not be altered, impaired or affected by these proceedings".

The basis for the *Simmons* decision was estoppel and the word "insolvent" and the interpretation to be placed thereon was not considered by the Court.

An examination of the Simmons record indicates that any other decision by the District Court or by the Circuit Court of Appeals would have permitted Simmons to attack collaterally the concluded bankruptcy proceedings.

The Second Circuit decisions (*In re Walker*, 93 Fed. (2nd) 281; *In re Willow Cafeterias*, 22 Fed. (Supp.) 617, rev'd on another ground 95 Fed. (2nd) 306, cert. den. 304 U. S. 567) referred to by Simmons in her appeal brief were not considered by the Sixth Circuit since they were not pertinent to the issue in that case. The opinion of the Sixth Circuit does not discuss or even mention these cases.

In view of the decision of this Court in *Erie Railroad* v. *Tompkins* (304 U. S. 64) and position of counsel as stated

under Point I, the alleged conflict between the Sixth Circuit and the Second Circuit is of no moment. In *Ruhlin* v. *New York Life Insurance Company* (304 U. S. 202), this Court held:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

CONCLUSION.

The decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 953.—October Term, 1944.

John F. X. Finn, as Trustee of Childs Company, Petitioner,
vs.
Burton C. Meighan, Jr., as Substituted Trustee Under the Last Will and Testament of William T. Wood, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 21, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

Childs Company operates a chain of restaurants. In August 1943 it filed a voluntary petition for reorganization under Ch. X of the Bankruptcy Act (52 Stat. 885, 886, 11 U. S. C. §§ 526, 530) alleging that it was unable to pay its debts as they matured. The petition was approved and petitioner was appointed trustee of the debtor. Childs Company had been lessee of, and had operated a restaurant on, certain premises in New York City for over forty years. Its present lease is for a term of twenty-one years ending in 1947. That lease contains the following provision:

> "The tenant covenants that . . . if a petition in bankruptcy shall be filed by the tenant or *if the tenant shall be adjudged bankrupt or insolvent by any Court*, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means." (Italics added.)

In May 1944 petitioner advised the lessor that it desired to assume the lease. Respondent replied that the lease had ceased and come to an end by virtue of the bankruptcy proceedings. Thereafter, respondent petitioned the bankruptcy court for an order adjudging that the term granted by the lease had terminated. The court granted the relief asked by the petition. The Circuit Court of Appeals affirmed. 146 F. 2d 594. The case is here on certiorari.

The bankruptcy court does not look with favor upon forfeiture clauses in leases. They are liberally construed in favor of the bankrupt lessee so as not to deprive the estate of property which may turn out to be a valuable asset. *Gazlay* v. *Williams*, 210 U. S. 41; *Model Dairy Co.* v. *Foltis-Fischer, Inc.*, 67 F. 2d 704, 706. But an express covenant of forfeiture has long been held to be enforceable against the bankruptcy trustee. *Empress Theatre Co.* v. *Horton*, 266 Fed. 657; *Jandrew* v. *Bouche*, 29 F. 2d 346. And the 1938 revision of the Bankruptcy Act made no change in that regard. Congress granted the trustee sixty days (unless reduced or extended) in which to assume or reject a lease. § 70(b) of the Bankruptcy Act as amended, 11 U. S. C. § 110(b). But at the same time, Congress provided:

> "A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same shall be enforceable."

This provision was merely declaratory of the law as it then existed.[1]

There is some suggestion, however, that that provision is applicable only in ordinary bankruptcy proceedings and not to reorganizations under Ch. X. It is pointed out that frequently the value of enterprises is greatly enhanced by leases on strategic premises and that if forfeiture clauses were allowed to be enforced, reorganization plans might be seriously impaired. But Congress has made § 70 applicable to reorganization proceedings under Ch. X. By § 102 (11 U. S. C. § 1002) it provided that the provisions of Ch. VII (which includes § 70) should be applicable to proceedings under Ch. X "insofar as they are not inconsistent or in conflict with the provisions" of that chapter.[2] Moreover, Congress provided in § 102 that "provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors', and 'bankruptcy

[1] See 4 Collier on Bankruptcy (14th Ed. 1942), pp. 1239-1241; Weinstein, The Bankruptcy Law of 1938, p. 159.

[2] And see §§ 114 and 115. As respects the rejection or assumption of leases under Ch. X see §§ 116(1), 202, 216(4). Cf. In re Chase Commissary Corp., 11 F. Supp. 288.

But Congress has made the forfeiture provision of § 70 applicable to reorganization proceedings under Ch. X.

proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter." Thus we must read § 70(b) as providing that an express covenant is enforceable which allows the lessor to terminate the lease if a petition to reorganize the lessee under Ch. X is approved. Cf. *In re Walker*, 93 F. 2d 281. That being the policy adopted by Congress, our duty is to enforce it.

The question remains whether this lease should be so construed. There is to be a forfeiture "if the tenant shall be adjudged bankrupt or insolvent by any Court." It is said that "insolvent" is used interchangeably with "bankrupt". But it has long been held that a general assignment is an act of bankruptcy whether or not the debtor is insolvent. *West Co.* v. *Lea*, 174 U. S. 590. Thus it would seem that "adjudged bankrupt" and "adjudged insolvent" do not cover precisely the same ground. Moreover, insolvency in the equity sense has always meant an inability of the debtor to pay his debts as they mature.[3] Under the Bankruptcy Act it means an insufficiency of assets at a fair valuation to pay the debts. § 1(19), 11 U. S. C. § 1(19). It was long the practice to initiate reorganizations in the federal equity courts by the filing of a general creditor's bill which alleged insolvency in the equity sense.[4] There would accordingly seem to be no doubt that if a receiver were appointed pursuant to such a bill, it would bring into operation an express covenant providing for a forfeiture of a lease "if the tenant shall be adjudged insolvent by any Court." No reason is apparent why the same result should not obtain in cases of reorganization under Ch. X.

We do not believe a different result is indicated in this case merely because the provision for forfeiture on adjudication of insolvency appears in a paragraph otherwise exclusively devoted to the contingency of bankruptcy. Petitioner relies on the New York Debtor and Creditor Law, Consol. L., c. 12, which provides for the discharge of insolvent debtors in proceedings in the New York courts. §§ 50-88. It is said that insolvency under that statute means insolvency in the bankruptcy sense (§ 52) and that

[3] Glenn, Creditors' Rights and Remedies (1915), § 370.

[4] Re Metropolitan Railway Receivership, 208 U. S. 90; 1 Gerdes, Corporate Reorganizations (1936) §§ 13, 19. Part VIII, Report on the Study and Investigation of Protective and Reorganization Committees, Securities and Exchange Commission (1940), pp. 24 *et seq.*

the covenant in question was drawn so as to provide for a forfeiture in the event of such an adjudication. But as we have said, the covenant in this lease provides for forfeiture on an adjudication of insolvency "by any Court". It is difficult to see in that language a limitation of the covenant to an adjudication of insolvency by the New York courts under the Debtor and Creditor Law.[5]

Affirmed.

[5] The other provisions of New York law dealing with insolvency commonly define it as an inability to pay debts as they mature. The New York authorities are reviewed by Judge Knox in In re Schulte Retail Stores Corp., 22 F. Supp. 612, 616.